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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 835

A. J. ZACHARIASSEN & CO., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 30–36) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered June 2, 1941 (R. 36). A motion for new trial was overruled October 6, 1941 (R. 36). The petition for a writ of certiorari was filed January 3, 1942. The jurisdiction of this Court is invoked under the provisions of the Act of June 29, 1936, c. 872, 49 Stat. 2368.

QUESTION PRESENTED

Whether the refusal of the War Trade Board, from March 23, 1918, to July 12, 1918, to grant an export bunker license for necessary ship stores and supplies, constituted an unlawful detention of petitioner's sailing vessel *Albyn,* for which the United States should respond in damages.

STATUTES INVOLVED

The provisions of the Espionage Act of 1917, Title VII, Sec. 1, c. 30, 40 Stat. 225, and the special jurisdictional act of June 29, 1936, c. 872, 49 Stat. 2368, under which this claim was filed are set forth in the Appendix, *infra,* pp. 14–18.

STATEMENT

Pursuant to the private act of June 29, 1936, *infra,* p. 15, petitioner, a copartnerhip, brought suit in the Court of Claims to recover $75,635.40 damages, allegedly resulting from an unlawful detention by the United States of the *Albyn* in the Port of New York for a period of 131 days from March 22, 1918, to July 31, 1918 (R. 1–7). The petitioner alleged that the vessel was unlawfully detained because the issuance of a bunker license for necessary ship stores and supplies was refused for the purpose of detaining the vessel and for the purpose of having the vessel available for use by the United States or its allies (R. 5). The Court of Claims made detailed findings of fact (R. 8–29),

the material parts of which may be summarized as follows:

The *Albyn,* a sailing vessel of 1,993 net registered tons, was owned by a firm and persons residing in Finland (R. 10). Finland, a Grand Duchy of Russia, had declared its independence on December 6, 1917, but its independence was not recognized by the United States until 1919 (R. 10). The *Albyn* had arrived in the United States under the Russian flag, but had raised the Finnish flag while in port (R. 10).

On December 18, 1917, the vessel, then at Hampton Roads, Virginia, was chartered to the Vacuum Oil Company Proprietary, Ltd., New York, for shipment of a cargo of refined petroleum in cases from New York to one or two South African ports (R. 10). The charter was approved by the chartering committee of the United States Shipping Board on December 21, 1917, subject to the securing of an export license for the cargo (R. 10–11). It was also approved by the Inter-Allied Chartering Committee of London, England, on December 24, 1917 (R. 11). Prior to December 18, 1917, the Vacuum Oil Company was granted a license to export the cargo subject to revocation without notice (R. 11). The *Albyn* arrived in New York from Hampton Roads, Virginia, on February 14, 1918, loading was completed on March 22, 1918, and the charterer paid the total freight of $98,897.25 (R. 11).

On March 18, 1918, the agent of the owner of the *Albyn* filed with the War Trade Board[1] an application on behalf of the vessel for a bunker license for the necessary ship stores and supplies (R. 16). The application stated that the ship stores and supplies required for the voyage were to be taken out of the country and were to be sufficient to cover a 10-month period (R. 16–17). The ship stores and supplies required for the voyage, were goods and commodities of the class which under the law and proclamations of the President, and the rules and regulations made pursuant to law, could not be exported or taken out of the United States without a license from the War Trade Board (R. 17). On March 22, 1918, an application for clearance, not accompanied by a bunker license from the War Trade Board, was made to the collector of customs of New York. The application was refused solely on the ground that no bunker license for the needed stores and supplies was presented (R. 17).

Early in April 1918 the War Trade Board and the Shipping Board were concerned as to the attitude of the crews of the *Albyn* and other vessels similarly situated, the "present personnel" being regarded as an "undesirable risk no matter what guarantees were given" (R. 18). In the same

[1] Finding 7 (R. 11–14) sets forth in detail the manner in which authority was placed in the War Trade Board to issue, withhold, or refuse licenses for exportation of all articles except coin, bullion or currency.

month the War Trade Board received the opinion of the State Department that the vessels not be permitted to proceed, and information from the Shipping Board that some of the crew "were openly pro-German" (R. 1820). On April 21 the Board authorized its Bureau of Transportation to refuse licenses for bunkers to vessels whose crews were suspected of enemy affiliation (R. 21–22). Shortly thereafter the Navy was requested to keep the vessels and crews under observation until a definite decision was reached (R. 21–22).

While the application was under consideration, the agent of the vessel expressed doubt as to the responsibility of the crews and a representative of the Shipping Board suggested that for the safety of the ships and cargoes, the Shipping Board might charter them on a bare-boat basis (R. 19). Negotiations with respect to the chartering of the vessels ensued, but the matter was never formally considered by the Shipping Board, and the negotiations were terminated on June 10, 1918 (R. 20–23).

On June 21, 1918, the Director of the Bureau of Transportation of the War Trade Board requested the Navy Intelligence of the Navy Department to examine the crews of the vessels for the purpose of determining if the crews of the vessels were "Bolsheviki" or sympathetic with the "bolshevik" regime (R. 24). The investigation so requested disclosed that the captains and crews of the various vessels, including the

Albyn, had no Bolshevik inclinations (R. 25). This report of the Navy Intelligence was laid before the War Trade Board on July 8, 1918, and on July 9, 1918, the board approved the issuance of bunker licenses (R. 26).

During the period in question, at the request of the Secretary of the Navy (R. 14, 179–182), it was against the policy and regulations of the War Trade Board to issue bunker licenses for sailing vessels for a voyage into the submarine war zone because of the possibility of such supplies falling into the hands of enemy craft (R. 15). The actual sailing route taken by the *Albyn,* after the bunker license had been granted, is not shown because the vessel's log book had been destroyed, but the log books of certain other sailing vessels bound upon substantially the same voyage as the *Albyn,* and comprehended in the same special act, disclose that the course followed passed through the defined submarine zone (R. 16). The War Trade Board issued bunker licenses to a number of sailing vessels bound in the direction of South Africa, but there were considerations in respect of the safety of the vessels, cargoes, and stores not present in the case of the *Albyn* [2] (R. 16).

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[2] The record shows that the charterer, in all except three instances, was either the Shipping Board or agents for the British Ministry (R. 115). The nature of the cargo carried by most of these vessels is not shown (R. 214A). It accordingly appears that, notwithstanding the contention to the contrary made by petitioner (Pet. p. 18), there was evidence

On July 12, 1918, a bunker license was issued to the *Albyn* by the War Trade Board (R. 27). The *Albyn* applied for and obtained clearance on July 24, 1918, and sailed on July 31, 1918 (R. 28). The sailing of the *Albyn* was delayed for a period of 130 days as a result of the delay and refusal of the War Trade Board to grant a bunker license for stores and supplies (R. 28).

The court below found that the conditions and circumstances which formed the basis of the failure of the War Trade Board to grant the license for necessary ship stores and supplies without which the ship could not sail were (a) the probability that the vessel would proceed through the war danger zone, and due to its rate of travel, would be seized, together with its cargo and stores, by enemy craft; (b) the uncertainty of the political situation in Russia and Finland; and (c) the character and responsibility of the officers and crews of the vessels (R. 27). The court specifically found that there was no detention of the vessel for the purpose of compelling the owner thereof to charter it to the United States (R. 27), and that the detention of the *Albyn* by the United States was not unlawful (R. 28). The court accordingly entered judgment dismissing the petition (R. 36). Although it was unnecessary so to

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to support the finding of the court below that the decision as to these vessels may have been prompted by different considerations (R. 16).

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do, the court further found that if the United States had unlawfully detained the *Albyn*, the damage to which petitioner would be entitled would be $61,139.62 without interest.

ARGUMENT

The alleged detention of the *Albyn* consisted solely of the refusal to permit the vessel to export ship stores and supplies out of the United States.[3] Petitioner, relying upon authorities relating to the seizure of vessels, contends that the refusal to issue a bunker license to the *Albyn* was unlawful. The argument fails to distinguish between the seizure of vessels of foreign nationality and the regulation of the exportation of goods from the United States, misconceives the scope of the authority conferred upon the Board, and is plainly untenable.

1. The Board's refusal to issue a license prior to July 12, 1918, violated no domestic law. The Espionage Act of 1917, Title VII, Section 1, c. 30, 40 Stat. 225, expressly authorized the President during the war to prohibit by proclamation the exportation of any article from the United States except in accordance with the orders and regulations of the President. The President by proclamation, first effective July 15, 1917, prohibited the un-

[3] It is not suggested by petitioner that the *Albyn* could have sailed or proposed to sail without obtaining ship stores and supplies for its voyage.

licensed exportation of bunkers (40 Stat. 1683, 1691, 1746).[4] By Executive Order of October 12, 1917, the President vested in the War trade Board authority to "issue licenses under such terms and conditions as are not inconsistent with law" or "to withhold or refuse licenses, for the exportation of all articles" (R. 13–14). The Board thus plainly had the power to deny a license for bunkers for the *Albyn*.

2. The propriety of the Board's conduct cannot be judicially reexamined. The Board was acting on behalf of the President in performing one of his numerous war time duties. The Act in express terms authorized the President to prohibit exports whenever he found that the "public safety" so required, and to make exceptions for exports "at such time or times, and under such regulations and orders, and subject to such limitations and exceptions as the President shall prescribe." The Act left to the President the sole determination as to what exportations would not be consistent with the "public safety." Plainly the President's conduct in carrying out such a function in time of war is not subject to judicial review. This Court has so held in analogous circumstances. *Dakota Central Telephone Co.* v.

[4] These proclamations prohibited exports to all countries in the world, including "Great Britain, her colonies, possessions, and protectorates" (which would include South Africa), and Russia. Finland was not listed, apparently being regarded as a part of Russia.

South Dakota, 250 U. S. 163, 184; *United States v. Chemical Foundation, Inc.*, 272 U. S. 1, 15; *Martin* v. *Mott*, 12 Wheat. 19, 30–33. Cf. *United States* v. *Bush & Co.*, 310 U. S. 371, 379.

Reference to the factors responsible for the action of the War Trade Board in this case will demonstrate that the reasons underlying the exercise of discretion in such matters cannot be reexamined by the courts. The court below found (R. 27) and the record indicates that the Board's decision was motivated by two factors: (1) the policy against permitting sailing vessels to travel through the war zone,[5] and (2) a question as to the pro-German sympathies of the crew of what was referred to interchangeably as a Russian, Russian-Finnish and Finnish vessel (R. 17). In connection with the first point, the Secretary of the Navy had requested that sailing vessels be kept out of the war zone because of the ease with which their supplies could be seized and availed of by submarines (R. 179–182), and the Board had issued instructions to that effect (R. 181–182). The

[5] Although there is no reference in the record to any direct statement by the Board showing its action in this particular case to have been motivated by the policy against permitting sailing vessels to go through the war zone, the court below was warranted in inferring that the board was influenced by its rule (R. 181–182) that licenses not be granted in such circumstances. Even if material, direct testimony as to what was in the minds of the members of such a board would be difficult to produce nearly twenty years after the event.

route of petitioner's vessel would probably have passed through the war zone (R. 16).[6] On the second point uncertainty as to the relationship between Russia and the Allies after Russia's withdrawal from the war against Germany in 1917 was doubtless material. And although Finland had declared its independence of Russia in December 1917, it was not recognized as a separate nation by the United States until May 1919 (R. 10). The importance of the pro-Germany sympathies of the crews of sailing vessels passing through the war zone is demonstrated by a letter from the Secretary of the Navy implying that some sailing craft had been used to supply submarines with fuel (R. 179).

An object of Title VII of the Espionage Act was to protect the public safety by preventing needed supplies from falling into the hands of powers unfriendly to the United States. Officials charged with the enforcement of such a statute in time of war would reasonably and lawfully refuse to license the export of commodities unless and until entirely satisfied that they would not come into the hands of hostile powers.

3. The words "as are not inconsistent with law" in the Executive Order establishing the War Trade Board (R. 14), relied on by petitioner (pp.

[6] Inasmuch as the *Albyn's* log book had been destroyed before the trial, there was no evidence of the actual route taken after the bunker license was granted. But the log books of other vessels bound upon substantially the same voyages showed that the sailing route went through the war zone (R. 16).

21–22), relate only to the "terms and conditions" of a "license", and do not qualify the authority conferred on the Board by the President "to withhold or refuse" licenses. Moreover, the authorities cited by petitioner (Br. pp. 19–21) deal solely with the seizure of vessels and do not establish any rule of "law" which may be read into the Espionage Act or the authority delegated pursuant thereto as a limitation on the manner of regulating exports. Certainly neither Congress nor the President intended that because the refusal to issue an export license might prevent a vessel from sailing, licenses could be withheld only when justified by the preexisting law applicable to prizes or the seizure of vessels.[7] There is nothing in the Espionage Act or in the Executive Order constituting the War Trade Board which suggests any such restrictive requirement. On the contrary, the standard was to be the "public safety" of the United States.

4. The Board's refusal to grant a bunker license likewise violated no rule of international law.[8] It cannot be doubted that, under the law

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[7] It is unnecessary to consider, therefore, whether, as suggested by petitioner, a distinction exists between the grounds which warrant a capture at sea under the law of prize and those which justify the municipal seizure of a vessel.

[8] We assume for the purposes of argument that the jurisdictional act authorizes the Court of Claims to determine whether the denial of a license violates the law of nations. Cf. *Royal Holland Lloyd* v. *United States*, 73 C. Cls. 722, 734–736.

of nations, the United States may prohibit or regulate the exportation of any article produced in or which has become part of the general mass of goods of the United States. *Royal Holland Lloyd* v. *United States,* 73 C. Cls. 722, 742; *Swedish Arbitration Claims,* Department of State Series No. 5 (6), 26 Am. J. Int. L. 834, 874.[9] The authorities cited by petitioner, as previously observed, involve the seizure of vessels and do not even remotely suggest that the denial of a license for exports which may incidentally prevent a vessel's departure for lack of necessary provisions constitutes a seizure.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[9] Whether the United States may exercise a like authority with respect to goods *in transit* consistently with international law is a question not presented here. Cf. *Royal Holland Lloyd* v. *United States, supra.*